IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1004 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KOLI RAMESHBHAI MOHANBHAI

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1004 of 1993
MR JM PANCHAL for Petitioner No. 1
MR KG SHETH, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 14/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The present appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.75 of 1993 on 3.4.1993, convicting the appellant for the offences punishable under Section 302 of Indian Penal Code and Section 135 of Bombay Police Act. The appellant was sentenced to undergo imprisonment for life for the offence of murder whereas he was sentenced to simple imprisonment for a period of four months with a fine of Rs.100 for the offence punishable under Section 135 of Bombay Police Act. The Trial Court ordered that, in event of default in payment of fine, the appellant shall undergo further simple imprisonment for a period of 15 days. Aggrieved by the said judgment and order, the present appeal is preferred.

2. Facts of the case can be narrated thus:

2.1 An incident occurred at village Nana Jinjavadar of Gadhada taluka of Bhavnagar district at about 12.30 P.M. on 6.11.1992. One Shamji Mavji and another Bavchand Ogha were proceeding on the main road when the present appellant came running from behind and inflicted a knife blow on the right side of the deceased-Shamji Mavji. After inflicting the blow, as per the prosecution case, the appellant ran away. Cries were raised and, therefore, father of Shamji (Mavji Pragji) came running to the place. He met Shamji on the way when Shamji informed him that he was assaulted upon by the present appellant. Shamji was immediately taken to the hospital where he was declared dead. Police was informed by the hospital authorities and, therefore, police came to the hospital and recorded the complaint of Mavji Pragji at 14.30 hours.

2.2 As per the case of the complainant, on that day, in the morning, his wife-Laxmi and deceased Shamji had gone for cleaning the godown, which is adjacent to the house of the accused/appellant. Everybody returned to the house at about 11.30 hours when the present appellant came to their house and started hurling abuses. He, therefore, inquired of him as to why was he hurling abuses. At that time, the complainant was informed by his wife-Laxmi that while they were cleaning the godown in the morning, a small basket flew into the courtyard of Mohanbbhai-father of the appellant because of wind and, therefore, the appellant was hurling abuses. The appellant, however, was very much annoyed and said that he was not 'wearing bangles'. He was, however, soothed and then he went away. Thereafter, Shamji went out of the house. At that time, father of the

appellant-Mohanbhai Nanubhai also started hurling abuses. At that time, Jadavbhai Raghavbhai Patel intervened and sent away Mohanbhai. Thereafter, Shamji went to the market for having a 'Pan'. At about 12.30 P.M., he heard some uproar and he, therefore, apprehending some problem with Shamji, rushed towards the market. He came across his son-Shamji near the shop of Hasubhai Soni. Shamji was holding his hand on the right side of his trunk. The complainant inquired of Shamji as to what had happened whereupon he was informed by Shamji that when he and Bavabhai Oghahai were going to the house of Bavabhai, Koli Ramesh Mohanbhai came running and inflicted a knife blow on his right side and went away. The complainant noticed that Shamji was bleeding. Because of the uproar, Hasubhai Soni, Vashrambhai Patel, Jadavbhai Patel, etc. also came. By coincidence, a Government Jeep had come to the house of Madhuben (a Nurse) and, therefore, Shamji was taken to the Referral Hospital at Gadhada in that Jeep, where he was declared dead by the doctor.

2.3 On basis of the complaint, a First Information Report was registered by the police and investigation started. On investigation, the police found sufficient evidence against the assailant-Ramesh Mohanbhai Koli and, therefore, charge sheet was filed against him. The case was committed to the Court of Sessions at Bhavnagar and learned Additional Sessions Judge, Bhavnagar, framed charges against the accused vide Ex.3 for the offences punishable under Sections 302 and 504 of I.P.C. and Section 135 Section of Bombay Police Act. The accused-appellant pleaded not guilty to the charge and claimed to be tried.

2.4 The prosecution led documentary as well as oral evidence and, after considering the evidence led by the prosecution, the learned Additional Sessions Judge came to a conclusion that the prosecution could establish the charge of murder punishable under Section 302 of I.P.C. against the appellant and the offence punishable under Section 135, Bombay Police Act and convicted him therefor. The learned Additional Sessions Judge, however, came to a conclusion that the charge for offence punishable under Section 504 of I.P.C. could not be established and, therefore, recorded acquittal for that offence.

2.5 Aggrieved by the said judgment and order, the present appeal is preferred.

3. Learned advocate Mr. Panchal appearing for the appellant submitted that the Court below has committed an

error in evaluating and appreciating the evidence. He submitted that the prosecution case, taken as a whole, suffers from a number of discrepancies and shortcomings. The learned Additional Sesions Judge ought to have considered these aspects and acquitted the appellant of the charges or, at least, ought to have given benefit of doubt. Mr. Panchal submitted further that even if the incident was accepted as per the prosecution case, it could not have been taken as a case of murder punishable under Section 302 of I.P.C. At the most, the appellant could have been punished under Section 304 Part-II of I.P.C. To support his contentions, Mr. Panchal drew attention of this Court to the following aspects :-

(a) There is discrepancy between the complaint and the deposition of the complainant. The complainant says that the deceased told him that the appellant came running and gave knife blow on the right side of the deceased, whereas in his deposition, he says that the deceased told him that Ramesh had given him knife blow. Other details are not given. The oral dying declaration before the complainant, therefore, is not properly established.

(b) The complainant is not coming with whole truth. According to the complainant, soon after taking his meals, the deceased had gone for having a 'Pan' and soon thereafter, the incident occurred, whereas the medical evidence indicates that there was semi-digested food in the stomach and, according to the doctor, the deceased must have taken his food two to two and a half hours prior to his demise.

(c) There was absolutely no motive for the appellant to cause injury to the deceased and for a trifling incident in the morning, it cannot be said that the appellant had an intention of committing murder of the deceased. According to Mr. Panchal, this assumes importance when the prosecution has failed to examine any independent witness although the incident occurred in a thickly populated area. According to Mr. Panchal, therefore, the prosecution is not coming with real story and genesis of the incident is suppressed.

(d) The discovery of the weapon is not proved by the prosecution properly as the Panchas have not supported the prosecution case.

(e) The investigation is not independent and genuine. Although the weapon used in the commission of the offence was seized by the Investigating Officer, it has not been sent for chemical analysis to the Forensic Science Laboratory. The investigation is, therefore, not properly done.

(f) The complainant, who claims that the deceased gave oral dying declaration, has failed to reproduce the exact words. There is discrepancy in the version of the complainant in the complaint and the deposition regarding the exact words used by the deceased and the manner in which the incident occurred. He contended that there is no evidence to show that the deceased was in a fit state of mind for giving oral dying declaration. He submitted that conviction could not be recorded on such oral dying declaration.

(g) The prosecution case depends only on one eye-witness, namely, Bavachandbhai Oghabhai. His deposition suffers from many discrepancies. According to this witness, the appellant came from behind and gave a knife blow, whereas the medical evidence indicates that the blow must have been given from the front. This would render the deposition of this eye-witness doubtful. Mr. Panchal submitted further that, according to the complainant, he inquired about the incident from the deceased whereas this witness says that the complainant inquired from him about the incident and, therefore, the possibility of his being not present at the place of incident cannot be ruled out. Mr. Panchal submitted that the conduct of this witness is unnatural. In spite of his having seen the incident, he does not disclose about the same to anyone till his statement is recorded by the police. He also does not accompany the deceased to Gadhada and, therefore, when the prosecution case hangs only on deposition of solitary eye-witness, these discrepancies would render his deposition doubtful and the Trial Court has committed an error in recording conviction relying on such evidence.

(h) Mr. Panchal lastly submitted that blood stains are not found at the place of the incident although it is the case of the prosecution that

the deceased was bleeding.

3.1 Mr. Panchal submitted that for the foregoing contentions, the appeal may be accepted and the judgment and order of the Trial Court convicting the appellant may be set aside and the appellant may be acquitted of the offences for which he is convicted.

3.2 Alternatively, Mr. Panchal submitted that the incident occurred in absence of any motive. Only one blow is inflicted and one injury is caused. Despite the fact that the appellant had opportunity, he did not inflict further injuries. There was no premeditation and, therefore, the intention of causing death cannot be read. Mr. Panchal submitted that the case, therefore, would not fall within the definition of murder. The appellant may be given benefit of a conviction for lesser offence punishable under Section 304 Part II of I.P.C. In support of his case, Mr. Panchal places reliance on the following decisions :-

(1) Shitla Prasad alias Baba v. State of U.P., 1994 SCC (Cri) 1161.

(2) K. Ramakrishnan Unnithan v. State of Kerala, 1999 SCC (Cri) 410.

(3) Shankar v. State of M.P., AIR 1979 SC 1532.

(4) Gokul Parashram Patil v. State of Maharashtra, 1981 SCC (Cri) 731.

(5) Kulwant Rai v. State of Punjab, 1981 SCC (Cri) 826.

(6) Jawahar Lal v. State of Punjab, 1983 CRI. L.J., 429.

(7) Jagtar Singh v. State of Punjab, 1983 CRI. L.J., 852.

4. Learned Additional Public Prosecutor, Mr. Sheth, has opposed this appeal. According to him, the Lower Court has rightly considered and appreciated the evidence and it does not call for any interference by this Court.

5. The record and proceedings of the Trial Court is before us. We have gone through the record and proceedings and we find that there is evidence of Bavchand Ogha (Ex.14), who witnessed the incident. He, in clear terms, implicates the appellant. The

discrepancies that are sought to be pressed by the learned advocate for the appellant cannot be accepted. A look at the deposition clearly indicates that according to the witness, the appellant came running from behind, came alongside and then inflicted the knife blow and ran away. Even during cross-examination, he sticks to his version and says that the appellant came from behind and gave a knife blow and ran away. It is not possible to read the deposition as suggested by learned advocate Mr. Panchal regarding the manner in which the blow was given. Therefore, there is no discrepancy between the deposition of the eye-witness and the medical evidence.

5.1 The version of the eye-witness is consistent and has remained unshaken. No reasons are indicated to doubt the version of this eye-witness except the minor discrepancy indicated above. So far as the minor discrepancies are concerned, they are bound to creep in and undue importance cannot be given to such discrepancies. It would be unreasonable to expect a witness to give a deposition in the same language as his statement before police. It also cannot be overlooked that the witnesses suffer from fear of being disbelieved and, therefore, some frill or embroidery out of imagination is bound to creep in and unless such discrepancy or embroidery goes to the root of the prosecution case or hits the trustworthiness, it has to be ignored.

5.2 It becomes, therefore, very clear that the incident was witnessed by Bavachandbhai, P.W.3 (Ex.14), who clearly implicates the appellant.

6. Then there is deposition of the complainant-Mavjibhai Pragjibhai (Ex.12), who reaches the place of incident immediately after the incident when he is told by the deceased that the appellant inflicted knife blow on him. The deceased succumbs to the injury before he reaches the Referral Hospital at Gadhada. The oral dying declaration of the deceased comes immediately after the incident. The complaint is lodged almost immediately thereafter and, as such, there is no reason to doubt the version given by the complainant-Mavji Pragji.

7. It was contended that there is no evidence to show that the deceased was in fit state of mind to give oral dying declaration. As such, the declaration is recorded immediately after the incident and there was no scope for obtaining such a certificate. It is not even suggested that the deceased was not in fit state of mind

or that there was no orientation and, therefore, it is difficult to accept the contention raised in this regard.

8. Oral dying declaration is sought to be challenged on ground that the version of the complainant in complaint and deposition is not the same adverbatim. It is true that the complaint contains a little more details on oral dying declaration that the deposition, but that omission is not significant. The substance remains the same. Such a hyper technical approach cannot be adopted.

9. It was vehemently argued that there is discrepancy between the deposition of Mavji Pragji and the medical evidence. It was contended that, according to Mavjibhai, the deceased left for taking Pan soon after having his meals whereas the medical evidence indicates that there was semi-digested food in the stomach and that, according to the doctor, the deceased must have taken meals about two to two and a half hours prior to his demise. It requires to be noted that exact time of his taking meals and exact time of death are not brought on record. In light of the fact that the incident is proved by an eye-witness and a dying declaration, this contention loses significance.

10. Likewise, non-supporting of the prosecution case by the Panch witness to the discovery of weapon and non-sending of the same to the Forensic Science Laboratory by the Investigating Officer also lose their significance once the prosecution is able to establish the case against the accused-appellant through dependable evidence of eye-witness and complainant.

11. It was argued that the prosecution has suppressed the genesis that there was no motive for the accused-appellant to have assaulted the deceased. It is not possible to accept this contention because, admittedly, some incident had occurred in the morning while the deceased and his mother had gone to clean their godown which had provocated the accused-appellant. He went to the house of the deceased and hurled abuses. Thereafter, he went away and soon thereafter, within hours, the incident has occurred when the appellant rushes with a knife and causes fatal injury to the deceased without a word either from him or from the deceased. On the contrary, if the appellant had no motive, it would be a worse case for him if a fatal injury is caused to the deceased by him without any reason.

12. Alternatively, it was argued that since,

admittedly, as per the prosecution case, only one injury is caused, the intention of causing death cannot be inferred and, therefore, the case would fall under Section 304 Part II of I.P.C. This contention also cannot be accepted for the reason that the case, if taken as a whole, reflects that there was an altercation in the morning. After that was over, the appellant approached the deceased with a knife and without any quarrel or altercation or dispute at that point of time, inflicted the fatal knife blow.

12.1 The injury, though singular in nature, is on vital part of the body. The dimensions indicate that it was 2.5 cm. x 2 cm. x 10 cm. in size. The blow caused injury to the liver which was by 2 cm. x 5.5 cm. which, ultimately, resulted into the death of the deceased. Therefore, only because there was a single blow, it cannot be inferred that there was no intention. Intention has to be inferred from the overall circumstances, such as, the site of the injury, the dimensions of the injury, the weapon used and the circumstances in which it is caused. When the incident occurred, there was no reason for the appellant to assault the deceased, there was no reason for him to carry the knife and there was no reason for him to have inflicted a knife blow on vital part of the body with such a force that an injury of the abovestated dimensions could be caused. All these factors prevent us from accepting the contention that intention could not have been inferred. It is, therefore, not possible to accept the alternative submission for altering conviction under Section 304 of I.P.C.

13. The decisions relied upon by Mr. Panchal do not help the appellant much. In Shitla Prasad Alias Baba v. State of U.P., 1994 SCC (Cri) 1161, it was a case of sudden quarrel and a single injury was inflicted and considering the facts of that case, the Apex court ruled that it was a fit case for altering the conviction from one under Section 302, I.P.C. to Section 304 Part II, I.P.C. In the instant case, there was no quarrel at all. The appellant had come to the place and inflicted fatal blow and, therefore, this decision cannot help the appellant.

13.1 In K. Ramakrishnan Unnithan v. State of Kerala, 1999 SCC (Cri) 410, the conviction was altered from one under Section 302 to Section 304 Part II in a case where death was caused by a single blow with a knife. The appellant was on bail and the matter came up about 13 years after occurrence. Considering the facts of that

case, the sentence was altered. It was also observed that the incident occurred in absence of any animosity. The deceased was involved because of some altercation with another witness and, therefore, the alteration by the Apex Court comes. In the instant case, the facts are totally different. There was a quarrel in the morning and, thereafter, at the time of incident, without any altercation or dispute, a blow was given to the deceased.

13.2 In Shankar v. State of M.P., AIR 1979 SC 1532, the judgment was rendered in facts and circumstances of the case to indicate that the incident had occurred without any premeditation whereas, in the instant case, the appellant comes armed with a knife and inflicts a blow without any altercation and, therefore, it cannot be said that it was without premeditation.

12.3 In Gokul Parashram Patil v. State of Maharashtra, 1981 SCC (Cri) 731, a single knife blow caused by the appellant resulted into conviction of the appellant under Section 302, I.P.C. and the Apex Court observed that because a singular knife blow was inflicted on a non-vital part of the body which was also muscle deep, but it somehow cut the superior venecava, it was a fit case for converting the conviction to Section 304 Part II. In the instant case, the injury is 10 cm. deep which resulted into damage to the liver which proved to be fatal.

13.4 In Kulwant Rai v. State of Punjab, 1981 SCC (Cri) 826, a conviction under Section 302 was converted into one under Section 304 Part II of the I.P.C. by the Apex Court considering that the offence was committed without any premeditation; that there was no prior enmity; and that there was a short quarrel which preceded the assault. In the instant case, the facts are different. There was no altercation just before the incident. The appellant went to the place armed with a knife and inflicted the knife blow on vital part of the body.

13.5 In Jawahar Lal v. State of Punjab, 1983 Cri. L.J. 429, the Apex Court altered the conviction to Section 304 Part II from Section 302 of I.P.C. considering that solitary blow of knife was given by the accused following a trivial quarrel; that the deceased was not a party to the quarrel; and that no attempt to inflict a second blow was made.

13.6 In Jagtar Singh v. State of Punjab, 1983 Cri. L.J. 852, the Apex Court again altered a conviction

under Section 302 to one under Section 304 Part II by observing that, in that case, there was no premeditation and there was no malice. It was a case of chance meeting and only single blow was given.

14. In the instant case, as discussed above, the facts are dissimilar to the facts in above referred cases and the decisions of the Apex Court cannot be made applicable to the facts of the present case.

15. For the foregoing reasons, we do not find any substance in the contentions raised on behalf of the appellant. There is no error indicated to have been committed by the Trial Court in convicting the appellant and the appeal, therefore, must fail. The appeal is, therefore, dismissed and the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.75 of 1993 is hereby confirmed.

[M.C. PATEL, J.]

[A.L. DAVE, J.]

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